Nos. 823-830

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

UNITED STATES OF AMERICA, *Petitioner*,

v.

FRANKFORT DISTILLERIES, INC.; NATIONAL DISTILLERS PRODUCTS CORPORATION; BROWN FORMAN DISTILLERS CORPORATION; HIRAM WALKER, INCORPORATED; SCHENLEY DISTILLERS CORPORATION; SEAGRAM-DISTILLERS CORPORATION; McKESSON & ROBBINS, INCORPORATED; J. E. SPIEGLE.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

BRIEF FOR THE RESPONDENTS.

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OPINIONS BELOW.

The opinion of the Circuit Court of Appeals (R. 81) is reported in 144 F. (2d) 824. The opinion of the District Court (R. 32) is reported in 47 F. Supp. 160.

JURISDICTION.

The judgments of the Circuit Court of Appeals were entered on August 26, 1944 (R. 108-111). Petition for a writ of certiorari was filed September 30, 1944, and was granted

November 13, 1944 (R. 113-115). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, and as modified by Rule XI of the Criminal Appeals Rules.

STATEMENT OF CASE.

The statement in the petitioner's brief summarizes the allegations of the indictment and describes the proceedings leading up to the judgments appealed from. However, an understanding of the issues raised by this case requires elaboration of certain points.

With respect to the nature of the business involved, as pointed out in petitioner's statement, the indictment alleges: "Under the laws of the state of Colorado, alcoholic beverages shipped and sold in bottles by producers thereof may be sold to retailers in the State of Colorado only by wholesalers licensed as such under the laws of Colorado" (R. 7). As will appear from our argument, even this allegation is an incomplete statement of the extent to which the Colorado liquor laws insulate the retail liquor business from interstate commerce.

That retail liquor business was the sole object of the claimed conspiracy. Paragraph 30 of the indictment describes the conspiracy in general terms as one to raise, fix and maintain the *retail prices* of alcoholic beverages by raising, fixing and stabilizing *retail mark-ups and margins of profit* (R. 12). The opinion of the Circuit Court of Appeals characterizes the agreement as pleaded as "essentially one to fix and maintain prices at which alcoholic beverages shall be sold at retail in Colorado" (R. 93).

It is not claimed, however, that this is the ordinary type of price fixing conspiracy, in which competing sellers agree upon prices at which they will sell like products. There is no allegation in the indictment, and no inference from all of its allegations, that there was any agreement between producers as to the prices at which their competing products should be sold to wholesalers in interstate com-

merce. Neither is there any allegation or inference of any such agreement between wholesalers or between retailers. The alleged conspiracy is solely with respect to the amount of retail mark-up. Similar types of liquor made by different producers are not uniformly priced. They are in active price competition with each other in sales to wholesalers, retailers and consumers.

The indictment makes it clear that the alleged agreement to fix retail prices was made effective entirely by means of fair trade contracts, contracts under which the sellers of liquor fixed the minimum prices at which Colorado retailers might sell it to Colorado consumers. The factual allegations of the particulars of the conspiracy, with one exception, describe activities relating to such contracts (Paragraph 31(b)-(g) and (i), R. 13-15). Fair trade contracts are specifically authorized by the laws of Colorado and by the Miller-Tydings Amendment to the Sherman Act. The significance of this fact will appear in the course of our argument.

A final point to be noted is that the initiators of the alleged conspiracy are the Colorado retailers. It is not a combination by producers in various states to fix retail prices in Colorado. It is a combination by Colorado retailers operating exclusively within the limits of Colorado to regulate retailing activities in that state. Such retailers "persuade, induce and compel" producers and wholesalers to enter into fair trade contracts covering Colorado retail sales (Paragraph 31(b), R. 13). The sweeping statement in petitioner's brief (p. 11) with respect to horizontal agreement is not justified. So far as appears from the indictment no producer has agreed with any other producer on anything. The producers' only part in the alleged conspiracy has been acquiescence in the demands of Colorado retailers that their products sold at retail in Colorado shall be sold under the protection of enforceable fair trade contacts.

SUMMARY OF ARGUMENT.

I.

The allegations of the indictment, read in the light of Colorado legislation regulating the liquor traffic, make it clear that the retail liquor business to which the alleged conspiracy relates is intrastate and not interstate commerce. *Schechter Poultry Corporation* v. *United States*, 295 U. S. 495; *Industrial Association of San Francisco* v. *United States*, 268 U. S. 64; *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564; *Higgins* v. *Carr Brothers Co.*, 317 U. S. 572.

II.

Since the alleged conspiracy relates to intrastate transactions and local objectives, it does not fall within the scope of the Sherman Act unless it is shown to have a substantial effect upon interstate commerce. Decisions of this Court dealing with similar situations make it clear that the allegations of the indictment are insufficient to establish that the activities alleged had such substantial effect. *Industrial Association of San Francisco* v. *United States, supra; Levering & Garrigues Co.* v. *Morrin*, 289 U. S. 103; *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344; *United Leather Workers* v. *Herkert & Meisel Trunk Co.*, 265 U. S. 457.

The Government relies upon decisions of this Court condemning illegal systems of resale price maintenance. In all of the cited cases a vendor in one state had fixed prices upon sales in other states as part of a scheme for interstate distribution of his products. Those cases are not applicable here where retailers in Colorado have initiated a plan relating only to retail prices in Colorado. The controlling decisions are those sustaining systems of resale price maintenance under state laws prior to the enactment of the Miller-Tydings Amendment to the Sherman Act. *Max Factor & Co.* v. *Kunsman*, 5 Cal. (2d) 446, 55 P. (2d) 177 (1936), affd. in *Kunsman* v. *Max Factor & Co.*, 299 U. S.

198; *Joseph Triner Corp.* v. *McNeil*, 363 Ill. 559, 2 N. E. (2d) 929 (1936), and *Seagram-Distillers Corp.* v. *Old Dearborn Distributing Company*, 363 Ill. 610, 2 N. E. (2d) 940 (1936), affd. in *Old Dearborn Distributing Co.* v. *Seagram-Distillers Corp.*, and *McNeil* v. *Joseph Triner Corp.*, 299 U. S. 183.

The Government relies also on cases condemning conspiracies effected through certain types of boycott. An analysis of the allegations of the indictment with respect to withholding patronage and boycott shows only a refusal by Colorado retailers to purchase from Colorado wholesalers beverages not subject to satisfactory contracts with respect to retail prices in Colorado. None of the cases cited by the Government presented this situation of a boycott effected only in local transactions and having only a local purpose. The cases do not support the Government's position that such a boycott restrains interstate commerce simply because the market of producers or wholesalers shipping or receiving goods in interstate commerce may thereby be narrowed.

III.

A construction of the Sherman Act to cover activities of the essentially local character alleged in the indictment, relating only to alcoholic beverages in which there is a peculiar local interest, will seriously limit the freedom of Colorado and other states to work out their own local policies. Such legislation as the Colorado Fair Trade and Unfair Practices Acts and the Colorado Liquor Code raises questions of policy upon which there may be legitimate differences of opinion. With respect to local activities these questions of policy should be determined by local authorities, in the light of local conditions and local needs, unless substantial effect upon interstate commerce is shown. No such showing is made by this indictment.

ARGUMENT.

I.

The Retail Liquor Business in Colorado with which the Alleged Conspiracy Is Concerned Is Intrastate and Not Interstate Commerce.

The indictment in this case relates exclusively to liquor sales by Colorado retailers to Colorado consumers. As pointed out in our Statement, the indictment itself alleges that alcoholic beverages may be sold to retailers in the state of Colorado only by wholesalers licensed as such under the laws of Colorado. An examination of the Colorado statutes shows that this is not a mere technical requirement, satisfied by change of title without interruption of transit or other purely formal arrangement.

The law of Colorado, to effectuate a policy of border control, requires all alcoholic liquors to be the sole and exclusive property of a duly licensed Colorado wholesaler at the moment such liquors cross the Colorado State line (Regulation 12 C of the State Licensing Authority). All such liquors must be affixed with the proper State excise tax stamp by the state licensed wholesaler before sale or transfer within the State (Regulation 1(3)).[1] In other

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[1] The regulations were promulgated by the State Licensing Authority pursuant to Section 23(c) of the Colorado Liquor Code (Colorado Statutes Annotated (1935), Chapter 89, Section 38(c)), printed in the Appendix (*infra*, p. 38). The relevant provisions of Regulation 1 are as follows:

> "3. All malt, vinous and spirituous liquors sold or transferred within the State of Colorado must be affixed with the proper stamps before sale or transfer. Manufacturers, rectifiers and the first licensee receiving liquor within the State are primarily liable for the excise tax. * * * Wholesalers shall affix the proper stamps upon all liquors sold by them within this State to retailers or consumers prior to delivery. * * *"
>
> "4. Only Colorado licensed manufacturers, rectifiers and wholesalers shall be permitted to purchase excise tax stamps from the State Treasurer. * * *"

Regulation No. 12 C is as follows:

words, before liquor imported into Colorado can be sold or offered for sale to any retailer it must become the property of a licensed Colorado wholesaler and come to rest in his warehouse in order that the cases may be broken open and the state tax stamps affixed by him to each individual bottle.

It is clear that alcoholic beverages delivered to the wholesaler in accordance with these requirements are no longer in interstate commerce and that the subsequent sales to retailers and by retailers to consumers are intrastate commerce. *Schechter Poultry Corporation* v. *United States*, 295 U. S. 495, raised the question whether poultry, purchased from commission men at markets or railroad terminals where it arrived from other states and taken to a wholesaler's local plant for slaughter and disposition to local retailers and butchers, was still in interstate commerce. The Court said (pp. 542-43):

> "When defendants had made their purchases, whether at the West Washington Market in New York City or at the railroad terminals serving the City, or elsewhere, the poultry was trucked to their slaughterhouses in Brooklyn for local disposition. The interstate transactions in relation to that poultry then ended. Defendants held the poultry at their slaughterhouse markets for slaughter and local sale to retail dealers and butchers who in turn sold directly to consumers. Neither the slaughtering nor the sales by defendants were transactions in interstate commerce."

Industrial Association of San Francisco v. *United States*, 268 U. S. 64, involved a combination of contractors and

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"It is hereby required that all alcoholic liquors and fermented malt beverages shall be the sole and exclusive property of and subject to the unrestricted power of disposal of a duly licensed Colorado wholesale liquor dealer as defined in Section 17 of Chapter 142 or Section 5(2) of Chapter 82, Session Laws of Colorado of 1935 at the time such liquors and malt beverages cross the Colorado State line and are imported into this State for the purpose of being sold, offered for sale or used in this State."

dealers in builders' materials in San Francisco which acted to prevent sales of building materials except to contractors who supported the combination's open shop policy. The Court, holding no violation of the Sherman Act was established, said (p. 78):

> "It is true, however, that plaster, in large measure produced in other states and shipped into California, was on the list; but the evidence is that the permit requirement was confined to such plaster as previously had been brought into the state and commingled with the common mass of local property, and in respect of which, therefore, the interstate movement and the interstate commercial status had ended."

Any doubt as to the continued authority of these cases has been dispelled by the decisions of this Court in cases under the Fair Labor Standards Act. *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, and *Higgins* v. *Carr Brothers Co.*, 317 U. S. 572, both involved the status of delivery employees of wholesalers at warehouses receiving merchandise in interstate commerce but delivering it exclusively in the states where the warehouses were located. The *Jacksonville* case involved three types of transactions. Some merchandise was purchased upon order by particular customers with the definite intention that it should be promptly delivered to those customers. Other merchandise was purchased by the wholesaler to meet the needs of particular customers pursuant to a preexisting contract or understanding with those customers. With respect to both these types of transactions, this Court held that the goods remained in commerce until they actually reached the customers. There was a practical continuity of movement from the manufacturers or suppliers without the state, through the wholesaler's warehouses, and on to customers whose prior orders or contracts were being filled.

No allegations in the present indictment support the conclusion that the Colorado liquor business is of this character. The nature of the product and the Colorado liquor

laws negative any such idea. Liquor is not a specialty item, with particular customers ordering special products. It consists almost entirely of standard merchandise suitable for the needs of all or large groups of customers.

The transactions involved in this indictment fall rather within the third class of business considered in the *Jacksonville* case and the only class considered in the *Higgins* case. Commodities ordered by the wholesaler and received in interstate commerce were placed in the warehouse to meet the anticipated needs of retail customers who ordered them from the wholesaler in accordance with their changing requirements. As to such commodities when the merchandise was unloaded at the wholesaler's place of business "interstate movement had ended." "Subsequent local sales and deliveries were purely intrastate activities * * *." *Higgins* v. *Carr Brothers Co.*, 138 Me. 264, 25 A. (2d) 214, 216. The same conclusion has been reached in numerous decisions by the Circuit Court of Appeals.

Jewel Tea Co. v. *Williams*, 118 F. (2d) 202 (C. C. A. 10th, 1941);

Jax Beer Co. v. *Redfern*, 124 F. (2d) 172 (C. C. A. 5th, 1941);

Allesandro v. *C. F. Smith Co.*, 136 F. (2d) 75 (C. C. A. 6th, 1943);

Walling v. *Sanders*, 136 F. (2d) 78 (C. C. A. 6th, 1943).

We do not understand that the petitioner now seriously urges that the alcoholic beverages remain in interstate commerce after they reach the Colorado wholesaler's warehouse. To be sure, petitioner's brief does suggest (p. 27) that no allegation of the indictment shows that the beverages might not have remained in interstate commerce. It is novel doctrine that a Sherman Act indictment is sufficient if the facts alleged show that the commerce alleged to be restrained might be interstate. What is required is facts showing that it was interstate. The facts in this case and the law of Colorado combine to establish the opposite.

Petitioner does not even argue that the allegations of Paragraph 18 of the indictment (R. 7), that alcoholic beverages are marketed in the state of Colorado "by means of a continuous flow of shipments from producers located outside the state of Colorado, through wholesalers and retailers, to the consuming public", and that "wholesalers and retailers are the conduit through which alcoholic beverages" shipped from other states are distributed to consumers in Colorado, are sufficient for this purpose. The allegations were, of course, designed to bring the case within the stream of commerce doctrine enunciated in *Swift and Company* v. *United States*, 196 U. S. 375. The cases already cited make it clear that it is inapplicable. It was considered and expressly rejected in the *Schechter* case, *supra*, 295 U. S. at 543-44, and the *Industrial Association* case, *supra*, 268 U. S. at 79.

It did not change the result in the *Jacksonville Paper* case, even though it appeared that the wholesaler's customers formed a fairly stable group, that their orders were recurrent as to kind and amount of merchandise and that it was possible to estimate with considerable precision the needs of the trade. These facts were insufficient to establish that "practical continuity in transit necessary to keep a movement of goods 'in commerce' ", "that the goods in question were different from goods acquired and held by a local merchant for local disposition." 317 U. S. at 570.

Not even these facts appear in the present case. Not only as a matter of practice but by specific statutory requirement there must be a change in title to liquor between producer and wholesaler and between wholesaler and retailer.[2] Shipments must be delivered to the wholesalers' warehouses, in order that the cases can be broken open and state tax stamps affixed to each individual bottle. There can be no further movement in interstate commerce and delay of

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[2] There is no question here of wholesalers acting as mere agencies for producers such as was involved in *Binderup* v. *Pathe Exchange Inc.*, 263 U. S. 291.

uncertain duration in the wholesalers' warehouses and on the retailers' shelves is a normal incident of the traffic. Under these circumstances, to consider retail transactions as a part of a flow of commerce is to characterize as interstate commerce every transaction in a commodity which has ever moved interstate.

II.

The Alleged Conspiracy Does Not Have the Substantial Economic Effect Upon Interstate Commerce Necessary to Bring It Within the Scope of the Sherman Act.

Although the alleged conspiracy relates only to the retail liquor business in Colorado, and although exclusively intrastate transactions and local objectives are involved, the question remains whether it so affects interstate commerce as to come within the condemnation of the Sherman Act. This is a question of construction of the Sherman Act, and not one of the extent of federal power under the terms of different statutes. The fact that one phase of an enterprise may be subject to control under one federal statute, for example the National Labor Relations Act, does not mean that a different phase of the same enterprise comes within the commerce protected by the Sherman law. *Kirschbaum Co. v. Walling*, 316 U. S. 517, 521. The answer to the question whether the activities here alleged are restraints of interstate commerce forbidden by the Sherman Act is to be found in the cases construing that Act.

In analyzing those cases, we must take into account that the construction of the Sherman Act, like other problems under the Commerce Clause, involves the application of the test whether the activities in question exert a substantial economic effect upon interstate commerce, and that this problem in each case is one of degree. Furthermore, where, as here, the Sherman Act is proposed to be applied to new facts which show only intrastate activity, and to a commodity requiring unique local control, that question of degree may not be considered "without regard to the impli-

cations of our dual system of government." *Kirschbaum Co.* v. *Walling, supra,* at p. 520. In the words of former Chief Justice Hughes (*Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board,* 303 U. S. 453, 466):

> "It is also clear that where federal control is sought to be exercised over activities which separately considered are intrastate, it must appear that there is a close and substantial relation to interstate commerce in order to justify the federal intervention for its protection. However difficult in application, this principle is essential to the maintenance of our constitutional system. The subject of federal power is still 'commerce,' and not all commerce but commerce with foreign nations and among the several States. The expansion of enterprise has vastly increased the interests of interstate commerce but the constitutional differentiation still obtains. *Schechter Corporation* v. *United States,* 295 U. S. 495, 546. 'Activities local in their immediacy do not become interstate and national because of distant repercussions.' *Id.,* p. 554."

We believe that an analysis of the Sherman Act cases in the light of these considerations clearly establishes that there was here no forbidden restraint of interstate commerce.

A situation similar to that here in question was presented by *Industrial Association of San Francisco* v. *United States, supra.* An association of contractors and other associations and individuals combined to enforce an "open shop" labor policy by preventing contractors not cooperating from obtaining building materials. As pointed out above, the restrictions were limited to commodities produced in California or materials shipped in which had come to rest within the state. Both coercive and persuasive measures were used to enforce the restrictions, the effect of which was to exclude non-complying contractors from operating and, as a necessary consequence, from purchasing in interstate commerce materials which they would normally have used in their business. The Court held that the combina-

tion did not violate the Sherman Act, saying (268 U. S. 77, 82):

> "* * * The thing aimed at and sought to be attained was not restraint of the interstate sale or shipment of commodities, but was a purely local matter, namely, regulation of building operations within a limited local area, so as to prevent their domination by the labor unions. Interstate commerce, indeed commerce of any description, was not the object of attack, 'for the sake of which the several specific acts and courses of conduct were done and adopted.' *Swift and Company* v. *United States*, 196 U. S. 375, 397. The facts and circumstances which led to and accompanied the creation of the combination and the concert of action complained of, which we have briefly set forth, apart from other and more direct evidence, are 'ample to supply a full local motive for the conspiracy.' *United Mine Workers* v. *Coronado Co.*, 259 U. S. 344, 411."

> "* * * The alleged conspiracy and the acts here complained of, spent their intended and direct force upon a local situation,—for building is as essentially local as mining, manufacturing or growing crops,—and if, by a resulting diminution of the commercial demand, interstate trade was curtailed either generally or in specific instances, that was a fortuitous consequence so remote and indirect as plainly to cause it to fall outside the reach of the Sherman Act."

Levering & Garrigues Co. v. *Morrin*, 289 U. S. 103, involved a suit to enjoin a strike of structural steel workers in New York. Structural steel used in New York was shipped from other states and the necessary result of the strike was to put an end to this interstate commerce, yet it was held that no violation of the Sherman Act was involved. The opinion states (289 U. S. at p. 107):

> "* * * Accepting the allegations of the bill at their full value, it results that the sole aim of the conspiracy was to halt or suppress local building operations as a means of compelling the employment of union labor, not for the purpose of affecting the sale or transit of materials in interstate commerce. *Use* of the materials

was purely a local matter, and the suppression thereof the result of the pursuit of a purely local aim. Restraint of interstate commerce was not an object of the conspiracy. Prevention of the local use was in no sense a means adopted to effect such a restraint. It is this exclusively local aim, and not the fortuitous and incidental effect upon interstate commerce, which gives character to the conspiracy. *Compare Bedford Cut Stone Co.* v. *Stone Cutters Assn.*, 274 U. S. 37, 46-47; *Anderson* v. *Shipowners Assn.*, 272 U. S. 359, 363-364. If thereby the shipment of steel in interstate commerce was curtailed, that result was incidental, indirect and remote, and, therefore, not within the anti-trust acts, as this court, prior to the filing of the present bill, had already held."

In addition to these cases holding that local restrictions with respect to sale or use of articles which have moved in interstate commerce do not violate the Sherman Act, even though they will inevitably affect interstate commerce by substantially changing conditions of demand, there are, of course, cases reaching a like conclusion with respect to restrictions on production of articles destined for interstate commerce. *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344; *United Leather Workers* v. *Herkert & Meisel Trunk Co.*, 265 U. S. 457. In those cases likewise, although the local activity by reducing the supply of commodities available for the interstate market will inevitably affect the interstate flow and the competitive conditions and prices in that market, there is no forbidden restraint under the Sherman Act so long as an effect upon the interstate market is not the objective of the conspiracy.

There are no allegations of fact in this indictment establishing that there was any different or greater effect on interstate commerce than that incidental to changes in demand resulting from local activities, which was also present in the cases cited. There is no allegation of any interference with the movement of liquor into Colorado. There is no allegation of any effect on the price in interstate commerce, or the quality. There is not even any allegation of

fact showing that the quantity of liquor shipped into Colorado was in any way reduced. There are only general allegations that commerce was restrained, which are mere conclusions not admitted by respondents' pleas of *nolo contendere.*

The petitioner's argument that the activities here alleged violate the Sherman Act rests upon two types of cases, decisions of this Court condemning systems of resale price maintenance and decisions condemning conspiracies effected through certain types of boycott. Not one of the cases cited presents a factual situation comparable to that alleged in this case—an agreement initiated by retailers in a single state, affecting and intended to affect only the local retail disposition of commodities which are subject to peculiar constitutional and statutory local control and which are at rest in that state after interstate commerce has ended, and obtained and enforced by refusal to purchase such commodities from local dealers. Such a situation plainly is primarily the concern of the single state involved. By comparison with the interest of that state, any effect upon interstate commerce is insubstantial. No problem of a far-reaching conspiracy with which the local authorities can not effectively deal is presented. If remedial action is required, it is well within the power of those authorities.

A. *The Resale Price Maintenance Cases.*

The petitioner relies upon *Dr. Miles Medical Company* v. *Park & Sons Co.*, 220 U. S. 373, *Ethyl Gasoline Corporation* v. *United States*, 309 U. S. 436, *United States* v. *Univis Lens Co.*, 316 U. S. 241, and *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707. Each of these cases involved a system of price maintenance initiated by a producer[3] in one state and effective in every state where the product was marketed. In the *Dr. Miles* and *Univis* cases price maintenance

[3] In the *Bausch & Lomb* case the system was initiated by an exclusive distributor which may, for present purposes, be regarded as the producer.

was enforced in wholesale as well as retail, and in interstate as well as intrastate transactions. In the *Univis*, *Bausch & Lomb* and *Ethyl* cases, the producer made it a condition of his interstate sales that the purchaser sell only to customers selected and licensed by him. The selection of distributors to be licensed was based not only upon their cooperation in maintaining prices on the producer's own product, but on general selling policies with respect to other products—in the *Ethyl* case upon a policy of adherence to posted prices of the major gasoline companies, and in the *Univis* and *Bausch & Lomb* cases upon a general policy of not cutting prices upon any products and of avoidance of such practices as price advertising, installment selling, or maintaining places of business in jewelry or department stores.

The petitioner suggests that these facts have no importance, that there is no difference in the effect upon interstate commerce between the situations considered in those cases and the one alleged in the indictment. We believe that the differences are real and substantial. In the cases cited a producer in one state was establishing, as part of an interstate system of distribution, rules for the conduct of trade interstate and within other states. His policy in any one state was dictated not by market conditions in that state, but by manufacturing conditions in the state of manufacture and by market conditions throughout the country. The producer effectively determined the profits to be realized by all distributors, those in interstate commerce and those in the several states, always presumably with the ultimate objective of obtaining the maximum profits from its own business. In short, the motives were not local but national. The means likewise were not local but national. The immediate instrument for affecting conditions in the several states was the producer's interstate business. In part for that reason, the states in which the product was distributed could have no effective regulatory power. Action to remedy the local situation might result only in cutting off the flow of goods entirely.

In the present case, a particular price policy has been initiated by the retailers in a single state for the sole purpose of affecting conditions in the retail trade in that state. The immediate instrument for effecting this policy is not interstate commerce, but refusal to purchase in local transactions commodities not sold in accordance with the local policy. There is no attempt to affect manufacturing or selling conditions in other states. Interstate commerce is affected only in the sense that conditions of local demand must always affect it, by cutting down the flow of commodities which for any reason are not purchased in the local market.[4]

The cases which cover such a situation are those upholding fair trade contracts entered into pursuant to state laws prior to the adoption of the Miller-Tydings Amendment to the Sherman Act. It was a frequent defense in such cases that the fair trade acts were unconstitutional because they were a regulation of interstate commerce. The courts consistently held that where the contracts in issue were limited to setting resale prices on intrastate transactions there was no such effect upon interstate commerce as to result in a conflict with the federal commerce power.

Max Factor & Co. v. *Kunsman*, 5 Cal. (2d) 446, 55 P. (2d) 177 (1936);

Joseph Triner Corp. v. *McNeil*, 363 Ill. 559, 2 N. E. (2d) 929 (1936);

Seagram-Distillers Corp. v. *Old Dearborn Distributing Company*, 363 Ill. 610, 2 N. E. (2d) 940 (1936);

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[4] We believe that it was all these considerations and not as suggested in petitioner's brief (pp. 9-10), the single factor that the fair trade contracts fixed prices only on intrastate sales, which led the Circuit Court of Appeals to conclude with respect to the alleged conspiracy: "Its sole objective was control of domestic enterprise within the state, and it spent its direct and substantial force upon intrastate activities. Its effect, if any, on interstate commerce was indirect, insubstantial and incidental." (R. 95.)

Johnson & Johnson v. *Weissbard*, 121 N. J. Eq. 585, 191 Atl. 873 (1937);
Weco Products Company v. *Reed Drug Co.*, 225 *Wis.* 474, 274 N. W. 426 (1937).

We direct attention particularly to the *Seagram*, *Joseph Triner* and *Max Factor* cases. In each one the commodities in question had been produced outside the state. In each one they were distributed within the state either by a sales affiliate or an exclusive sales agent of the producer. In each case when the producer shipped its product in interstate commerce it did so with knowledge that upon retail sale in the state of destination the product would be subject to a fair trade contract. Yet in the *Joseph Triner* case the defendant did not even urge on appeal its claim that the state statute conflicted with the federal commerce power, and in the other two cases the contention was rejected by the state courts. The judgments in all three cases were affirmed by this court without consideration of the question. *Kunsman* v. *Max Factor & Co.*, 299 U. S. 198; *Old Dearborn Distributing Co.* v. *Seagram-Distillers Corp.*, and *McNeil* v. *Joseph Triner Corp.*, 299 U. S. 183.

These cases are clearly inconsistent with petitioner's contention that the alleged conspiracy falls within the condemnation of the Sherman Act simply because producers know that the products they ship will become subject to resale price contracts, if and when they are sold in Colorado. That this is the petitioner's position is not left to inference. Its brief quotes with approval the statement from *United States* v. *Food and Grocery Bureau of Southern California*, 43 F. Supp. 966, 972 (S. D. Cal.), dealing with a conspiracy by California merchants, that "It is the agreement on the price, *in advance*, which constitutes the violation * * *."[5]

[5] It is to be noted that the affirmance of this case in 139 F. (2d) 973 (C. C. A. 9th) and the opinion of the same Circuit Court of Appeals in *California Retail Grocers & Merchants Association* v. *United States*, 139 F. (2d) 978 (C. C. A. 9th), cert. denied 322 U. S.

The reason why the Government takes this position is clear. No less sweeping rule will condemn the conspiracy here alleged. Section 1 of the Colorado Fair Trade Act[8] authorizes resale price contracts by either the producer or distributor of trade marked or branded commodities. There is no requirement that the seller entering into such contracts be the owner of the trade mark, brand or name under which they are sold. It follows that every substantive feature of the claimed conspiracy could have been effected entirely within the State of Colorado by wholesalers and retailers without producer participation. Had the indictment alleged such a conspiracy, the only basis for jurisdiction under the Sherman Act would be the fact that the prices in the local retail market would tend to affect the volume of alcoholic beverages moving in interstate commerce. Yet the alleged producer participation in the conspiracy charged in the indictment did not result in any different or greater effect upon interstate commerce. In both cases it is indisputable that the substantial economic effect is entirely local. Any effect upon interstate commerce is secondary and insignificant. Unless this Court is prepared to hold that every local conspiracy with respect to prices of commodities which have moved in interstate commerce is a violation of the Sherman Act it must reject the petitioner's contention.

B. *The Boycott Cases.*

The Government cites cases in which conspiracies carried out through boycotts have been held violations of the Sher-

729, do not rest on any such broad ground. The opinion in the former case points out (139 F. (2d) at 976) the existence of "direct and intentional discrimination against, and restraint of, out-of-state grocery products which competed with local products." The latter opinion stated (139 F. (2d) at 983) that "The purpose of the conspiracy was to 'stabilize' the entire trade in California in all sales, whether interstate or intrastate."

[8] 1937 Session Laws, Chapter 146, printed in full in the Appendix, *infra*, p. 39.

man Act and urges that the allegations of this indictment that refusal to patronize and boycott were part of the conspiracy bring it within the authority of those cases. They clearly have no application to the present situation.

As a preliminary matter it is necessary to analyze the allegations of the indictment with respect to refusal to patronize producers and wholesalers who do not enter into fair trade contracts and boycott of those who do not enforce them. Section 4 of the Colorado Fair Trade Act provides:

> "Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of this Act, *whether the person so advertising, offering for sale or selling is or is not a party to such contract*, is unfair competition and is actionable at the suit of any person damaged thereby." (Italics ours.)

The effect of this provision is that if a producer enters into a fair trade contract with a single Colorado retailer it establishes minimum prices to be charged not only by that retailer but by all retailers who are notified of the restriction. Read in the light of this fact, the allegations of paragraph 31(d) of the indictment (R. 13-14) that the Package Association circulates bulletins and notices announcing the adoption of fair trade contracts, and that defendant retailers patronize only those producers and wholesalers who enter into fair trade contracts and withhold their patronage from those who fail to do so, lose much of their significance. The charge amounts to no more than that Colorado retailers refrain from puchasing beverages not subject to fair trade contracts.

Paragraph 31(f) of the indictment (R. 14) relates only to enforcement of contracts already entered into. It alleges an agreement by retailers, producers and wholesalers that retailers not observing the minimum prices fixed by such contracts shall be deprived of opportunity to purchase bev-

erages, and that retailers boycott producers and wholesalers who do not live up to this agreement. One obligation of sellers entering into fair trade contracts is to compel observance by the purchasers of the minimum prices fixed.[7] The Fair Trade Acts in their very essence call for uniform enforcement of the prices established. If a vendor may enforce observance of those prices by some retailers and not by others, then every retailer must hold his business life at the sufferance of the vendor. With these facts in mind, the courts have recognized that failure of a seller to police and enforce his fair trade contracts will render such contacts unenforceable. *Calvert Distillers Corp.* v. *Nussbaum Liquor Store*, 166 Misc. 342, 2 N. Y. S. (2d) 320 (Sup. Ct., 1938); *Calvert Distillers Corp.* v. *Stockman*, 26 F. Supp. 73, 76 (E. D. N. Y., 1939). The allegations of paragraph 31(f), like those of 31(d), therefore, amount to no more than the charge that Colorado retailers refrain from buying from Colorado wholesalers alcoholic beverages not subject to enforceable fair trade contracts. There is no claim of a refusal by respondents to enter into any transaction in interstate commerce. There is no allegation that producers boycotted or threatened wholesalers or that wholesalers boycotted or threatened producers.

The boycott cases cited by the petitioner presented a very different situation. *Fashion Originators' Guild, Inc.* v. *Federal Trade Commission*, 312 U. S. 457, involved a nation-wide conspiracy to eliminate from commerce, both interstate and intrastate, all garments made from copied

[7] A standard form of producer-retailer fair trade contract contains the following typical provision:

> "(5) 'Manufacturer' in good faith will employ all appropriate means, which in the circumstances shall be reasonable, including legal proceedings if such other means fail, to prevent and to enforce the discontinuance of, any violation of said minimum retail price stipulations by any competitor of 'Retailer,' whether the person violating or threatening such violation is or is not a party to a fair trade contract with 'Manufacturer' covering said 'Commodities'." (CCH Trade Regulation Service, Vol. 2, par. 7021.)

designs. Garment manufacturers refused to sell, interstate or intrastate, to retailers who sold copied garments. Textile manufacturers refused to sell, interstate or intrastate, to garment manufacturers who sold to such retailers, again either in interstate or intrastate transactions. Interstate commerce was both an immediate instrument and a primary objective of the conspiracy.[8]

Loewe v. *Lawlor*, 208 U. S. 274, *Duplex Printing Press Company* v. *Deering*, 254 U. S. 443 and *Bedford Cut Stone Company* v. *Journeymen Stone Cutters' Assn.*, 274 U. S. 37, each involved a boycott in one state (or many states) designed to compel unionization of an industry in another state by suppressing interstate trade in its products. In those cases suppressing interstate commerce was a means deliberately adopted for effecting the ultimate purpose, not merely an incidental result. The local boycott served no local purpose. The immediate object was suppression of interstate commerce, the ultimate one to affect conditions in another state.

In this case there was an exclusively local aim, a desire to fix minimum profit margins on retail liquor sales in Colorado only. Pursuant to that local aim, Colorado retailers refrained from purchasing from Colorado wholesalers liquors not subject to satisfactory retail-price maintenance contracts. The effect, if any, upon interstate commerce was purely fortuitous and incidental, the result of local activities for local purposes.

Petitioner's argument that the alleged boycott was a restraint of interstate commerce violating the Sherman Act rests upon the same foundation as its similar contention

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[8] In *Eastern States Retail Lumber Dealers' Association* v. *United States*, 234 U. S. 600, retailers in several states combined to boycott manufacturers selling direct to consumers. Again, the boycott was made effective by refusal to consummate interstate transactions and was designed to eliminate direct sales, both interstate and intrastate. *Stevens Company* v. *Foster & Kleiser Co.*, 311 U. S. 255, likewise involved a refusal to engage in interstate transactions, directed at preventing persons not members of the combination from obtaining necessary materials in interstate commerce.

that local activities with respect to prices constitute such a restraint. Its position is that the alleged boycott of producers and wholesalers was a restraint of interstate commerce "since their market in Colorado is restricted when Colorado retailers refuse to buy their product" (Petitioner's Brief, pp. 26-27).[9] It argues that the local scope and purpose, the absence of intent to affect interstate commerce are not material.

Such a rule would extend federal jurisdiction under the Sherman Act to almost any local activity with respect to products which have moved or will move in interstate commerce. Concerted action by local consumer groups with reference to price, quality, or method of sale of articles produced in other states, may be the subject of action by the Department of Justice, or the basis for triple damage suits by manufacturers or merchants. To take a specific example, concerted action by consumers against the products of a manufacturer charging exorbitant prices through the medium of fair trade contracts would be a violation of the Sherman Act.

III.

A Construction of the Sherman Act to Cover the Activities Alleged in This Indictment Would Be An Unwarranted Encroachment Upon the Power of the States to Deal With Their Own Local Problems.

In the preceding section of this brief we have pointed out that the question whether the economic effect of intrastate activities upon interstate commerce is so substantial as to

[9] *Local 167* v. *United States*, 291 U. S. 293, does not support any such broad rule. That case involved a series of restraints, including interference with unloading of the commodities at railroad terminals, in part in another state, and with sales by and transportation from the commission men acting on behalf of interstate shippers at those terminals, to wholesalers in New York. See *Greater New York Live Poultry Chamber of Commerce* v. *United States*, 47 F. (2d) 156 (C. C. A. 2d). This Court characterized the entire conspiracy as one "to burden the free movement of live poultry into the metropolitan area." 291 U. S. at 297.

justify application of the Sherman Act can not be determined "without regard to the implications of our dual system of government". See *supra*, pages 11-12. Those implications have been referred to in somewhat general terms in the course of our argument. However, this case presents the problem not in any general way but sharply and specifically.

In its Fair Trade Act[10] and in its Unfair Practices Act[11] Colorado has given effect to a policy which imposes some limitations upon the free play of competitive forces. In its Liquor Code[12] and related legislation, Colorado has adopted a program for regulation of the liquor business in that state, which includes the substantial insulation of that business from interstate commerce (*supra*, pp. 6-7) and provides for the enforcement of resale price contracts by criminal penalties and expulsion from that business by license forfeiture. If the jurisdiction of the Federal Government under the Sherman Act is extended to the entirely local activities alleged in this indictment, the freedom of the state of Colorado to work out the policies embodied in these two groups of laws is substantially impaired.

A. *The Colorado Fair Trade and Unfair Practices Acts.*

The Colorado Fair Trade Act and Unfair Practices Act are typical of legislation widely adopted in the various states[13] for the purpose of eliminating certain competitive practices thought to be undesirable. The effect of the Fair Trade Act sufficiently appears from our previous discussion. The Unfair Practices Act prohibits locality discrimination and sales below cost for the purpose of injuring

[10] Printed in the Appendix, *infra*, pp. 39-41.

[11] 1937 Session Laws, Chapter 261, as amended, 1941 Session Laws, Chapter 227, printed in the Appendix, *infra*, pp. 41-46.

[12] Relevant provisions are printed in the Appendix, *infra*, pp. 33-38.

[13] Fair Trade Acts have been adopted in 45 states. Legislation similar to the Unfair Practices Act has been adopted in more than 25 states. See CCH Trade Regulation Service, Vol. 2, page 7503.

competitors and destroying competition (Sections 1 and 3). Cost is carefully defined to include the cost of doing business, with allowance for such items as interest, depreciation, credit losses, insurance and advertising (Section 3). Provision is made for use, in proving the costs of any person complained against under the statute, of established cost surveys of the trade or industry involved (Section 5). Section 9 of the Act authorizes suits for injunction and damages, not only by individuals but also by trade associations which may be affected.

Both statutes, therefore, limit some types of price competition and contemplate a substantial degree of stabilization of the retail mark-ups with which the indictment in this case is concerned. They authorize agreements or cooperative action to effectuate their purpose. They are a recognition of the fact that certain competitive practices may be used to destroy competition and produce monopoly, so that limitations on such practices promote rather than endanger the competitive system. The question of how far the agreements or cooperative action contemplated by the statutes may go before they in turn become a danger to the competitive system is one of degree upon which there may be legitimate differences of opinion.

The petitioner urges that the particular activities alleged in this indictment have passed the permissible limit and are not authorized by the Fair Trade Act and Unfair Practices Act. This is not the important issue. The real question is whether the determination that essentially local activities are or are not within limits set by local statutes should be made by state officials and state courts or by a department of the Federal Government and the federal courts. If federal jurisdiction under the Sherman Act extends to the exclusively local activities here involved, then the Federal Department of Justice is in a position to impose its ideas of sound practice under the state statutes, and, by instituting criminal or civil proceedings under the Sherman Act, to submit this question to the federal courts. The decision of those courts that a particular course of conduct violates

the Sherman Act would override any state court decision that similar conduct is within the terms of the state statute.

The nature of the issues that may be involved is illustrated by this indictment. Producers are included in the indictment as defendants, even though it is apparent that the initiators of the alleged conspiracy were local retailers who "persuade, induce, and compel" producers to participate in the conspiracy (Paragraph 31(b), R. 13). That participation consisted in the execution of fair trade contracts (Paragraph 31(b)), agreement on forms of such contracts and their revision (Paragraph 31(c) and (e), R. 13-14), and in enforcement of the contracts when made, including agreement that retailers not observing the prices established should be deprived of the opportunity to purchase the producers' products (Paragraph 31(f) and (g) R. 14). No details are given as to what the producers actually did, with what distributors arrangements may have been concluded, whether contracts were made through representatives of the retailers' association or with several retailers or wholesalers, or with a single retailer. A consideration of the practical operation of a system of fair trade contracts demonstrates that there is a wide variation in the types of conduct which might be covered by this indictment.

As already pointed out, under Section 4 of the Fair Trade Act, the minimum prices set in a single contract must be observed not only by the contracting retailer but by all other retailers who have notice of the restrictions. The producer can not make a series of contracts establishing different minimum prices, and thereby different mark-ups, adjusted to any variations in the costs of doing business as defined in the Unfair Practices Act and to varying desires as to margin of profit of different retailers. The producer must negotiate a single contract adjusted to the requirements of all dealers in Colorado. Strictly interpreted, the allegations of the indictment may mean no more than that each producer discussed prices with a single retailer, agreed on the prices suggested by the retailer, and promised to en-

force observance of those prices by all reasonable means. The allegations of the indictment may mean that each producer had such discussions with several retailers, three, or thirty, or three hundred. He may have negotiated with them separately, or held a joint meeting with several or many. He may have negotiated with a representative of several or with a representative of all. He may have dealt only with a wholesaler who in turn had discussed prices with several retailers. There is obviously room here for differences of opinion as to when permissible negotiation becomes forbidden agreement.[14] The answer reached will inevitably depend to a considerable extent upon the background of experience and the views as to the soundness of the legislation of those deciding the question. Knowledge of local conditions might lead a local administrator to a different conclusion than would be reached by one not familiar with the local situation. Officials who believe that resale price maintenance is undesirable will allow far less scope for negotiation than officials who approve of the statutory purpose. Where primarily local activities are involved, it should be the state officials and the state courts who answer such basic questions of policy. Federal policy should control only in those situations where interstate commerce is substantially involved, where the interest of the nation in such commerce outweighs the interest of the single state in effectuating its local policy.

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[14] Other similar questions are raised by the indictment. The allegation (Paragraph 31(f)) that producers and wholesalers agreed with retailers that non-complying retailers be deprived of the opportunity to purchase their products raises the question whether such a course of conduct is a reasonable means of enforcing the contracts. The allegation that the defendant associations threatened to institute and instituted legal proceedings against non-complying retailers (Paragraph 31(f)) raises issues as to when joint pursuit of remedies provided by the Fair Trade Act ceases to be legitimate. The allegations that mark-ups and margins of profit were high, arbitrary and non-competitive (Paragraph 31(a), (b), (f)) must be tested in the light of the requirements of the Fair Trade Act and Unfair Practices Act that mark-ups on the same brands be non-competitive and that all mark-ups include proper allowances for cost of doing business.

The problem presented here bears definite analogies to another problem on which Mr. Justice Holmes expressed himself in a famous dissent:

> "I must add one general consideration. There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several States, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect." (*Truax* v. *Corrigan*, 257 U. S. 312, 344.)

It will likewise be unfortunate if, by making the reach of the Sherman Act for practical purposes all inclusive, experiments of the several states in connection with adoption and administration of legislation like that in question must be subordinated to the ideas of sound policy held by federal officials, and to the uniform rules established by the federal courts. We can see no practical justification for interference by the federal Government here. If the Colorado statutes are being violated or the privileges given by those statutes abused, Colorado has ample power to remedy the situation. There is no problem here of a far-reaching conspiracy with which a single state can not deal. Neither is there any problem here like that presented, for example, under the National Labor Relations Act, of sub-standard conditions in one state necessarily tending to bring down the standards in other states. We cannot see how the price of liquor to the Colorado consumer, or the extent of the profits of Colorado retailers can have appreciable repercussions on such prices and profits in states other than Colorado.

B. *The Colorado Liquor Code.*

The State of Colorado has adopted a comprehensive Liquor Code regulating every phase of the liquor traffic in

Colorado.[15] As pointed out in the first part of our argument, to faciliate its regulatory and tax program Colorado has included in the Liquor Code provisions which substantially insulate liquor traffic within the state of Colorado from interstate commerce (see *supra*, pp. 6-7). Colorado can enforce such insulation notwithstanding the Commerce Clause of the Constitution because of the specific terms of Section 2 of the Twenty-first Amendment, which provides:

> "The transportation or importation into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."[16]

The purpose of this provision was to permit local regulation of local liquor problems, unfettered by the Commerce Clause of the Constitution. *Ziffrin, Inc.* v. *Reeves*, 308 U. S. 132, 138; *Indianapolis Brewing Co.* v. *Liquor Control Commission*, 305 U. S. 391, 394. "* * * local, not national, regulation of the liquor traffic is now the general Constitutional policy." (Concurring opinion of Mr. Justice Black, *Carter* v. *Virginia*, 321 U. S. 131, 138.)

Relevant to our present problem in addition to Colorado's policy of insulating local liquor traffic from interstate commerce is its encouragement of resale price maintenance in connection with liquor sales. By Section 3 of the Colorado Liquor Code it is made unlawful, and punishable by fine and imprisonment and forfeiture of license (Section 25, Appendix, p. 38) among other things,

> "To wilfully and knowingly advertise or offer for sale or sell any malt liquors, vinous liquors, spirituous

[15] See Appendix, *infra*, pp. ——

[16] This provision is a simplified version of the Webb-Kenyon Act (March 1, 1913, 37 Stat. 699) which was enacted prior to adoption of the Eighteenth Amendment for the purpose of removing the barrier of the federal commerce power to regulation of the liquor trade by the several states. See *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311, containing a discussion of the legislative and judicial background of the Webb-Kenyon Act.

> liquors and alcoholic beverages, whether the person so advertising, offering for sale, or selling, is or is not a party to such contract, at less than the price established in any contract entered into pursuant to the provisions of the Fair Trade Act, the same being Chapter 146, Session Laws of Colorado, 1937." (Session Laws 1941, page 520, Section 1, Amending Chapter 89, Section 17, 1935 Colorado Statutes Annotated.)

The purpose of including this provision in the Liquor Code is, of course, to insure the effectiveness of a device which prevents price cutting and destructive price wars which are considered demoralizing to the industry and the consumer alike. See *Reeves* v. *Simons*, 289 Ky. 793, 160 S. W. (2d) 149, 151 (1942).

Again, a determination that the Sherman Act is applicable to the local situation alleged in the indictment threatens the free development of these local policies with respect to the liquor traffic. The Government meets this suggestion by urging that nothing in the state law requires or even authorizes the activities alleged in the indictment. The answer, as in the case of the same argument with respect to the Fair Trade Act, is that the issue is not whether the acts of defendants were required or authorized by the state statutes, but whether jurisdiction to determine this question with respect to essentially local activities should be the responsibiliy of state authorities and state courts or of federal authorities and of federal courts. No action, legislative or administrative, has been taken by the Colorado authorities with respect to the activities here involved. They appeared by the Attorney General of Colorado in the Circuit Court of Appeals and in this Court[17] to urge that application of the Sherman Act to this local situation threatened the policies embodied in the Fair Trade and Unfair Practices Acts, and would jeopardize Colorado's control

[17] The Attorney General has requested that the brief he filed in opposition to the petition for writs of certiorari be considered also as a brief upon the merits.

over the intrastate liquor traffic. Admittedly, under the Twenty-first Amendment, the State of Colorado could require all liquor to be sold under fair trade contracts and could fix the mark-ups and margins of profit to be allowed. Why should the Federal Government say to the Colorado authorities, in effect, that they must adopt such specific legislation, regardless of whether the practical operation of the statutes already on the books produces similar results? The petitioner will no doubt say that the present system permits abuses which should be eliminated. Even if there are such abuses, so long as they affect the local situation they present a problem for solution by the State of Colorado, not by federal authority. If there are abuses only Colorado can effect a thorough reform. Application of the Sherman Act in particular cases can be only a palliative, more likely to delay than encourage action by the State if such action is needed.

A determination that the Sherman Act may be applied to this local situation can be justified only if there is the clearest showing of a close and substantial effect upon the interstate commerce which is the Federal Government's only legitimate concern. The allegations of this indictment make no such showing.

CONCLUSION.

We urge that the judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX.

CONSTITUTION OF COLORADO.

ARTICLE XXII.

On the thirtieth day of June, 1933, all statutory laws of the State of Colorado heretofore enacted concerning or relating to intoxicating liquors shall become void and of no effect; and from and after July 1st, 1933, the manufacture, sale and distribution of all intoxicating liquors, wholly within the State of Colorado, shall, subject to the Constitution and laws of the United States, be performed exclusively by or through such agencies and under such regulations as may hereafter be provided by statutory laws of the State of Colorado; but no such laws shall ever authorize the establishment or maintenance of any saloon.

ARTICLE XXIV.

Sec. 2. There is hereby set aside, allocated and allotted to the Old Age Pension Fund sums and money as follows:

* * * *

(b) Beginning January 1, 1937, eighty-five per cent. of all net revenue accrued or accruing, received or receivable from taxes of whatever kind upon all malt, vinous, or spirituous liquor, both intoxicating and non-intoxicating, and license fees connected therewith.

COLORADO LIQUOR CODE.[1]

Section 1. This Act shall be deemed an exercise of the police powers of the State for the protection of the economic and social welfare, the health and peace and morals of the people of this State, but no provisions of this law shall ever be construed so as to authorize the establishment or maintenance of any saloon.

Sec. 2. On and after the effective date of this Act, it shall be lawful to manufacture and sell for beverage or medicinal purposes malt, vinous or spirituous liquors, subject to the terms, conditions, limitations and restrictions contained in this Act.

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[1] 1935 Session Laws, Ch. 142, Colorado Statutes Annotated (1935), Ch. 89, Art. 2, Sections 15 *et seq.*

Sec. 3. It shall be unlawful for any person:

(a) To manufacture, sell or possess for sale any malt, vinous or spirituous liquors, excepting in compliance with this Act.

• • • •

(f) To manufacture for sale or sell malt, vinous or spirituous liquors unless licensed so to do as provided by this Act and unless all licenses required hereunder, of him or it, are in full force and effect.

(g) For any person other than one who holds a license under this Act to sell at retail any malt, vinous or spirituous liquors in sealed containers.

• • • •

(k) To have in his possession any package, parcel or container not bearing the excise tax stamps as may be required by this Act, or any of the within described containers on which the excise tax has not been paid to buy or re-use or to sell, transfer or give to any other person any alcoholic liquor container which has once been used on which is attached state excise stamps whether cancelled or not.

• • • •

(m) For any retailer or consumer, to buy any vinous or spirituous liquor from any person not licensed to sell and deliver at wholesale or retail or serve the same as provided by this Act.

• • • •

(r) For any person, except a person licensed to sell at wholesale hereunder, or except as otherwise expressly provided herein, to buy the State excise stamps provided for in this Act from the State Treasurer, or sell or offer for sale any such stamp except such as is purchased directly from the State Treasurer, by such person, or to re-use any state excise stamp which has been once attached to a bottle or container, or to affix a state excise stamp over any federal excise stamp or over any label.

• • • •

(t) To wilfully and knowingly advertise or offer for sale or sell any malt liquors, vinous liquors, spirituous liquors and alcoholic beverages whether the person so advertising, offering for sale or selling is or is not a party to such con-

tract, at less than the price stipulated in any contract entered into pursuant to the provisions of the Fair Trade Act, the same being Chapter 146, Session Laws of Colorado, 1937. *(Subsection (t) as added by L. 1941, Chap. 160, approved and effective April 15, 1941.)*

* * * *

Sec. 6. The Secretary of State shall be the Executive in charge of the enforcement of the terms and provisions of this article, and as the State Licensing Authority his duties and authority shall be as follows:

(a) To grant or refuse licenses for the manufacture and sale of malt, vinous and spirituous liquors, as provided for by law, and to suspend or revoke such licenses upon a violation of any law or any rule or regulation adopted by him in compliance with this Act.

(b) To make such general rules and regulations and such special rulings and findings as he may deem necessary for the proper regulation and control of the manufacture, sale and distribution of malt, vinous or spirituous liquors and the enforcement of this article, in addition thereto, and not inconsistent therewith, and may alter, amend, repeal and publish the same from time to time.

And not by way of limitation such rules and regulations may cover the following subjects: Compliance with, enforcement or violation of any law, rule or regulation; specifications of duties of officers and employees under him, instructions for other licensing authorities and law enforcing officers; all forms necessary or convenient in the administration of this Article; inspections, investigations, searches, seizures and such activities as may become necessary from time to time; sales on credit; limitation of the number of licensees as to any area or vicinity; misrepresentation, unfair practices; unfair competition; * * * practices unduly designed to increase the consumption of alcoholic beverages; and such other matters whatsoever as he may deem necessary and fair, impartial, stringent and comprehensive administration of this article, but nothing herein shall be construed as delegating unto the licensing authority the power to fix prices. The licensing authority shall make no rule which would abridge the right of any licensee to fairly, honestly and lawfully advertise the place

of business of or the commodities sold by such licensee. All such rules shall be reasonable and just.

* * * *

(e) To report to the Governor respecting the administration of this article, and to make such recommendations in regard to legislation and the administration of the article as said State Licensing Authority shall deem proper and necessary.

* * * *(Sec. 6 as amended by L. 1941, Chap. 159, approved and effective May 6, 1941.)*

* * * *

Sec. 10. In addition to any other penalties prescribed by this Act, any licensing authority hereunder shall have power, on his or its own motion or on complaint, after investigation and public hearing, at which the licensee shall be afforded an opportunity to be heard, to suspend and/or revoke any license, issued by such authority for any violation by the licensee or by any of the agents, servants or employees of such licensee of the provisions of this Act, or of any of the rules or regulations authorized hereunder, or of any of the terms, conditions or provisions of the license issued by such authority.

* * * *

Sec. 11. No license provided by this Act shall be issued to or held by:

* * * * *

(c) Any person who has been convicted of a felony or of any violation of any liquor law in any federal or state court of record in the State of Colorado.

* * * *

Sec. 17. (a) *Wholesaler's Liquor License.* Every person selling vinous or spirituous liquors at wholesale shall pay to the State Treasurer an annual license fee of One Thousand Dollars ($1,000.00) payable in advance.

(b) *Wholesaler's Beer License.* Every person selling malt liquors at wholesale shall pay to the State Treasurer an annual license fee of Five Hundred Dollars ($500.00) payable in advance; provided, that each license shall be separate and distinct each from the other but any person, firm, corporation, co-partnership may secure both licenses for the payment in advance of both fees.

(c) Said license or licenses shall entitle the licensee or licensees to:

(1) Maintain and operate two warehouses and one sales room in this state to handle products so described in the above license or licenses, the same to be denominated a wholesale wine and liquor store or a wholesale beer store or both, if required licenses have been provided.

(2) Take orders for vinous and spirituous liquors at any place and deliver vinous and spirituous liquors on orders previously taken to any place; provided, the said licensee has procured a wholesale wine and liquor license; provided, further, that the place where orders are taken and delivered is a place regularly licensed pursuant to the provisions of this Act.

(3) Take orders for malt liquors at any place and deliver malt liquors on orders previously taken to any place; provided the said licensee has procured a wholesale beer license; provided further, that the place where orders are taken and delivered is a place regularly licensed pursuant to the provisions of this Act.

(4) The provisions of this section shall not apply to any brewer licensed under this Act.

Sec. 18. Retail liquor stores as defined in this Act shall be licensed only to sell malt, vinous and spirituous liquors in sealed containers not to be consumed at the place where sold. Malt, vinous and spirituous liquors in sealed containers shall not be sold at retail other than in retail liquor stores, except as provided in Section 18-A of this Act.

Sec. 23. (a) An excise tax of three cents (3¢) per gallon or fraction thereof on all malt liquors, three cents per quart or fraction thereof on all vinous liquors containing 14% or less of alcohol, and six cents per quart or fraction thereof on all vinous liquors containing more than 14% of alcohol by volume, and twenty cents per pint or fraction thereof on all spirituous liquors is hereby imposed, and shall be collected on all such respective liquors sold, offered for sale, or used in this state; provided, that upon the same liquors only one such tax shall be paid in this state. The manufacturer thereof, or the first licensee receiving alcoholic liquors in this state, if shipped from without the state, shall be primarily liable for such tax; * * *

(b) The excise tax herein provided for shall be paid to the State Treasurer immediately upon delivery of the stamps, as provided for herein.

(c) All alcoholic liquors manufactured in this state, or sold therein, shall bear on the said container or containers, an excise stamp to be provided by the State Licensing Authority, which said stamp shall be affixed to all alcoholic liquors manufactured within this state by the manufacturer thereof before sale, or before being offered for sale, and all alcoholic liquors imported into the state immediately, upon entry therein, be affixed with the said excise stamp before being sold or offered for sale within the said state, and in accordance with the rules and regulations which may be promulgated by the State Licensing Authority, and provided also that all alcoholic liquors within the state, on the effective date of this Act, shall within a reasonable time thereafter, bear an excise stamp in the proper amount as provided herein.

Sec. 25. Violations and Penalty. Any person violating any of the provisions of this Act, or any of the rules and regulations authorized and adopted under it shall be deemed guilty of a misdemeanor and upon conviction shall be fined in the sum of not more than Five Thousand Dollars ($5,000.00) for each offense, or may be punished by confinement in the county jail for a term of not more than one year, or by both such fine and imprisonment, and the court trying such offense may decree that any license theretofore issued under the provisions of this Act or of any law relating to the sale of malt, vinous or spirituous liquors to such person operating the place of business in which said offense was committed be revoked, and may decree that no license for the sale of malt, vinous or spirituous liquors shall ever thereafter be issued to any such person convicted of such violation.

The penalties provided in this section shall not be affected by the penalties provided in any other section or sections of this Act but shall be construed to be in addition to any and all other penalties.

• • • •

COLORADO FAIR TRADE ACT[2]

An Act to protect trade-mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguished trade-mark, brand or name.

Be It Enacted by the General Assembly of the State of Colorado:

Section 1. No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand or name of the producer or distributor of such commodity, and which commodity is in free and open competition with commodities of the same general class produced or distributed by others shall be deemed in violation of any law of the State of Colorado by reason of any of the following provisions which may be contained in such contract:

(a) That the buyer will not resell such commodity at less than the minimum price stipulated by the seller.

(b) That the buyer will require of any dealer to whom he may resell such commodity an agreement that he will not, in turn, resell at less than the minimum price stipulated by the seller.

Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

(a) In closing out the owner's stock for the bona fide purpose of discontinuing dealing in any such commodity and plain notice of the fact is given to the public; provided the owner of such stock shall give to the producer of such commodity, or to the distributor, from whom the same was purchased, prompt and reasonable notice in writing of his intention to close out said stock, and an opportunity to purchase such stock at the original invoice price.

(b) When the trade-mark, brand or name is removed or wholly obliterated from the commodity and is not used or directly or indirectly referred to in the advertisement or sale thereof.

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[2] 1937 Session Laws, Ch. 146.

(c) When the goods are damaged or deteriorated in quality and plain notice of the fact is given to the public in the advertisement and sale thereof, such notice to be conspicuously displayed in all advertisements.

(d) By any officer acting under the orders of any court.

Sec. 2. This Act shall not apply to any contract or agreement between or among producers or between or among wholesalers or between or among retailers as to sale or resale prices.

Sec. 3. The following terms, as used in this Act, are hereby defined as follows:

(a) "Commodity" means any subject of commerce.

(b) "Producer" means any grower, baker, maker, manufacturer, bottler, packer, converter, processor, or publisher.

(c) "Wholesaler" means any person selling a commodity other than a producer or retailer.

(d) "Retailer" means any person selling a commodity to consumers for use.

(e) "Person" means an individual, a corporation, a partnership, an association, a joint-stock company, a public trust, or any unincorporated organization.

Sec. 4. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

Sec. 5. If any provision of this Act is declared unconstitutional, it is the intention of the Legislature that the remaining portions thereof shall not be affected, but that such remaining portions remain in full force and effect, but no part of this act shall prevent the payment of patronage refunds by cooperative agencies or associations existing and operating under the laws of this State.

Sec. 6. This Act may be known and cited as the "Fair Trade Act."

Sec. 7. The General Assembly hereby finds, determines and declares this Act to be necessary for the immediate preservation of the public peace, health and safety.

Sec. 8. In the opinion of the General Assembly an emergency exists; therefore, this Act shall take effect and be in force from and after its passage.

COLORADO UNFAIR PRACTICES ACT.[3]

AN ACT relating to unfair competition and discrimination, making certain unfair and discriminatory practices unlawful, defining the duties of the Attorney General in regard thereto, declaring certain contracts illegal and forbidding recovery thereon, providing for actions to enjoin unfair competition and discrimination and to recover damages therefor, making the violation of the provisions of this Act a misdemeanor and providing penalties, and to repeal chapter 187, Session Laws of Colorado, 1933.

Be It Enacted by the General Assembly of the State of Colorado:

Section 1. It shall be unlawful for any person, firm, or corporation, doing business in the State of Colorado and engaged in the production, manufacture, distribution or sale or any commodity, or products, or service or output of a service trade, of general use or consumption, or the sale of any merchandise or product by any public utility, with the intent to destroy the competition of any regular established dealer in such commodity, product or service, or to prevent the competition of any person, firm, private corporation, or municipal or other public corporation, who or which in good faith, intends and attempts to become such dealer, to discriminate between different sections, communities or cities or portions thereof, or between different locations in such sections, communities, cities or portions thereof in this state, by selling or furnishing such commodity, product or service at a lower rate in one section, community or city, or any portion thereof, or in one location in such section, community, or city or any portion thereof, than in another after making allowance for difference, if any, in the grade or quality, quantity and in the

[3] 1937 Session Laws, Ch. 261 as amended, 1941 Session Laws, Ch. 227.

actual cost of transportation from the point of production, if a raw product or commodity, or from the point of manufacture, if a manufactured product or commodity. Motion picture films when delivered under a lease to motion picture houses shall not be deemed to be a commodity or product of general use, or consumption, under this Act. Nothing in this Act contained shall be construed to affect or apply to any service or product sold, rendered or furnished by any public utility, the sale, rendition or furnishing of which is subject to regulation by the Colorado Public Utilities Commission or by any municipal regulatory body. This act shall not be construed to prohibit the meeting in good faith of a competitive rate. The inhibition hereof against locality discrimination shall embrace any scheme of special rebates, collateral contracts or any device of any nature whereby such discrimination is, in substance or fact, effected in violation of the spirit and intent of this Act.

Sec. 2. Any person who, either as director, officer or agent of any firm or corporation or as agent of any person, violating the provisions of this Act, assists or aids, directly or indirectly, in such violation shall be responsible therefor equally with the person, firm or corporation for whom or which he acts.

In the prosecution of any person as officer, director or agent, it shall be sufficient to allege and prove the unlawful intent of the person, firm or corporation for whom or which he acts.

Sec. 3. It shall be unlawful for any person, partnership, firm, corporation, joint stock company, or other association engaged in business within this State, to sell, offer for sale or advertise for sale any article or product, or service or output of a service trade for less than the cost thereof to such vendor, or give, offer to give or advertise the intent to give away any article or product, or service or output of a service trade for the purpose of injuring competitors and destroying competition and he or it shall also be guilty of a misdemeanor, and on conviction thereof shall be subject to the penalties set out in Section 11 of this Act for any such act.

(a) The term "cost" as applied to production is hereby defined as including the cost of raw materials, labor and

all overhead expenses of the producer; and as applied to distribution "cost" shall mean the invoice or replacement cost, whichever is lower, of the article or product to the distributor and vendor plus the cost of doing business by said distributor and vendor.

(b) The "cost of doing business" or "overhead expense" is defined as all costs of doing business incurred in the conduct of such business and must include without limitation the following items of expense: labor (including salaries of executives and officers), rent, interest on borrowed capital, depreciation, selling cost, maintenance of equipment, delivery costs, credit losses, all types of licenses, taxes, insurance and advertising.

Sec. 4. In establishing the cost of a given article or product to the distributor and vendor, the invoice cost of said article or product purchased at a forced, bankrupt, closeout sale, or other sale, outside of the ordinary channels of trade may not be used as a basis for justifying a price lower than one based upon the replacement cost as of date of said sale of said article or product replaced through the ordinary channels of trade, unless said article or product is kept separate from goods purchased in the ordinary channels of trade and unless said article or product is advertised and sold as merchandise purchased at a forced, bankrupt, closeout sale, or by means other than through the ordinary channels of trade, and said advertising shall state the conditions under which said goods were so purchased and the quantity of such merchandise to be sold or offered for sale.

Sec. 5. In any injunction proceeding or in the prosecution of any person as officer, director or agent, it shall be sufficient to allege and prove the unlawful intent of the person, firm or corporation for whom or which he acts. Where a particular trade or industry, of which the person, firm or corporation complained against is a member, has an established cost survey for the locality and vicinity in which the offense is committed, the said cost survey shall be deemed competent evidence to be used in proving the costs of the person, firm or corporation complained against within the provisions of this act.

Sec. 6. The provisions of Section 3, 4, and 5 shall not apply to any sale made:

(a) In closing out in good faith the owner's stock or any part thereof for the purpose of discontinuing his trade in any such stock or commodity, and in the case of the sale of seasonal goods or to the bona fide sale of perishable goods to prevent loss to the vendor by spoilage or depreciation, provided notice is given to the public thereof;

(b) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof;

(c) By an officer acting under the orders of any court;

(d) In an endeavor made in good faith to meet the legal prices of a competitor as herein defined selling the same article or product, or service or output of a service trade, in the same locality or trade area.

Any person, firm or corporation who performs work upon, renovates, alters or improves any personal property belonging to another person, firm or corporation, shall be construed to be a vendor with (within) the meaning of this Act.

Sec. 7. The secret payment or allowances of rebates, refunds, commissions, or unearned discounts, whether in the form of money or otherwise, or secretly extending to certain purchasers special services or privileges not extended to all purchasers purchasing upon like terms and conditions, to the injury of a competitor and where such payment or allowance tends to destroy competition, is an unfair trade practice and any person, firm, partnership, corporation, or association resorting to such trade practice shall be deemed guilty of a misdemeanor and on conviction thereof shall be subject to the penalties set out in section 11 of this Act.

Sec. 8. Any contract, express or implied, made by any person, firm or corporation in violation of any of the provisions of Sections 1 to 7, inclusive, of this Act is declared to be an illegal contract and no recovery thereon shall be had, provided, no part of this Act shall prevent the payment of patronage refunds by cooperative agencies or associations existing and operating under the laws of this State.

Sec. 9. Any person, firm, private corporation or municipal or other public corporation, or trade association, may maintain an action to enjoin a continuance of any act or

acts in violation of sections 1 to 7, inclusive, of this Act and, if injured thereby, for the recovery of damages. If, in such action, the court shall find that the defendant is violating or has violated any of the provisions of sections 1 to 7, inclusive, of this Act, it shall enjoin the defendant from a continuance thereof. It shall not be necessary that actual damages to the plaintiff be alleged or proved. In addition to such injunction [injunctive] relief, the plaintiff in said action shall be entitled to recover from the defendant three times the amount of the actual damages if any, sustained.

Sec. 10. Any person, firm, or corporation, whether as principal, agent, officer or director, for himself, or itself, or for another person, or for any firm or corporation, or any corporation, who or which shall violate any of the provisions of section 1 to 7, inclusive, of this Act, is guilty of a misdemeanor for each single violation and upon conviction thereof, shall be punished by a fine of not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000.00), or by imprisonment not exceeding six (6) months or by both said fine and imprisonment, in the discretion of the court.

Sec. 11. If any section, sentence, clause or phrase of this Act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of the Act. The Legislature hereby declares that it would have passed this Act, and each section, sentence, clause or phrase thereof, irrespective of the fact that any one or more other sections, sentences, clauses or phrases be declared unconstitutional. The remedies herein prescribed are cumulative.

Sec. 12. The Legislature declares that the purpose of this Act is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair and discriminatory practices by which fair and honest competition is destroyed or prevented. This act shall be literally construed that its beneficial purposes may be subserved.

Sec. 13. This act shall be known and designated as the "Unfair Practices Act."

Sec. 14. Chapter 187 of the Session Laws of Colorado, 1933, is hereby repealed.

Sec. 15. The General Assembly hereby finds, determines and declares this Act to be necessary for the immediate preservation of the public peace, health and safety.

Sec. 16. In the opinion of the General Assembly an emergency exists; therefore, this act shall take effect and be in force from and after its passage.